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No. 89-

IN THE
Supreme Court Of The United States

October Term, 1989

AIR COURIER CONFERENCE OF AMERICA,
Petitioner,

v.

AMERICAN POSTAL WORKERS UNION,
AFL-CIO, et al.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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March 8, 1990

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QUESTIONS PRESENTED

1. Are postal employees within the "zone of interest" of the statutes that establish and allow the United States Postal Service to suspend the postal monopoly when "the public interest requires?"

2. Did the court of appeals err in rejecting the Postal Service's interpretation of the "public interest" standard for suspending its monopoly by requiring the Postal Service to make specific determinations of potential revenue losses and their effects on the costs and service to all postal patrons in addition to finding benefits to the general public, competition and users of remail services?

LIST OF PARTIES

In addition to the parties named in the caption, the parties below included the United States Postal Service and the National Association of Letter Carriers, AFL-CIO. The Air Courier Conference of America is a trade association with approximately 150 members.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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The Air Courier Conference of America (ACCA), intervenor below, petitions the Court to grant a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit which vacated summary judgment dismissing a suit by the American Postal Workers Union, AFL-CIO and the National Association of Letter Carriers, AFL-CIO (referred to jointly as "Unions"), against the United States Postal Service (Postal Service).

OPINIONS BELOW

1. Restrictions on Private Carriage of Letters; Suspension of the Private Express Statutes; International Remailing, Final Rule, United States Postal Service, 51 Fed. Reg. 29,636 (August 20, 1986), see Appendix (App.) 19a to 26a.

2. American Postal Workers Union, AFL-CIO v. United States Postal Service, Civil Action No. 87-3199 (D.D.C.), Order granting Air Courier Conference of America's motion to intervene (February 26, 1988), see App. 27a.

3. American Postal Workers Union, AFL-CIO v. United States Postal Service, 701 F.Supp. 880 (D.D.C. 1988), see App. 28a to 38a.

4. American Postal Workers Union, AFL-CIO v. United States Postal Service, 891 F.2d 304 (D.C. Cir. December 8, 1989), see App. 1a to 18a.

JURISDICTION

The order of the court of appeals was entered on December 8, 1989. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Air Courier Conference of America (ACCA) was a party below. See district court order granting ACCA's motion to intervene (February 26, 1988), App. 27a; ACCA's Entry of Appearance in the court of appeals (February 6, 1990). ACCA is bound by the court of appeals' decision. *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007 (D.C. Cir. 1985).

This Court "recognize[s] that intervenors in lower federal courts may seek review in this Court on their own, so long as they have 'a sufficient stake in the outcome of the controversy' to satisfy the constitutional requirement of genuine adversity." *Maine v. Taylor*, 477 U.S. 131, 136 (1986); citing *Bryant v. Yellen*, 447 U.S. 352, 368 (1980); *Diamond v. Charles*, 476 U.S.

54, 68 (1986); see *City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 83-84 (1958).

ACCA members engage in remail pursuant to the Postal Service regulation at issue, 39 C.F.R. § 320.8. ACCA has standing pursuant to *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *International Union, UAW v. Brock*, 477 U.S. 274, 288-290 (1986).

RELEVANT STATUTES AND REGULATIONS

The Private Express Statutes (PES), 18 U.S.C. §§1693-1699, 1729 (1982); 39 U.S.C. §§601-606 (1982); provide in pertinent part as follows:

18 U.S.C. §1696. Private express for letters and packets

(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town or place to any other city, town or place, between which mail is regularly carried, shall be fined not more than \$500 or imprisoned not more than six months, or both.

39 U.S.C. §601. Letters carried out of the mail

(b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.

The Postal Service's International Remail Rule, 39 C.F.R. §320.8 (Aug. 20, 1986), provides in pertinent part:

§320.8 Suspension for international remailing.

(a) The operation of 39 U.S.C. §601(a)(1) through (6) and §310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit

the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

STATEMENT OF THE CASE

1. Administrative Proceedings

After years of threatening private air couriers with action under the Private Express Statutes, 18 U.S.C. §§1693-1699, 1729 (1982), 39 U.S.C. §§601-606 (1982) (PES), that embody the postal monopoly, the Postal Service in 1979 preempted impending Congressional action¹ to legitimize the air courier industry by suspending the postal monopoly for "extremely urgent letters." 39 C.F.R. §320.6, 44 Fed. Reg. 61,181 (October 24, 1979). In the years following adoption of the urgent letter rule, air couriers and others began offering a service that came to be known as international remail. Remail involves the express shipment of multiple letters or printed papers to a foreign post office for delivery in that country or third countries.

Purporting to "clarify" the 1979 urgent letter rule, the Postal Service in 1985 proposed a rule banning international remail. 50 Fed. Reg. 41,462 (October 10, 1985). That proposal drew nearly universal opposition from the highest levels of the Reagan Administration, Congress, the remail industry, and mailers. The grounds for opposition included: (1) questions as

¹ See Senate Comm. on Governmental Affairs, Postal Service Amendments Act of 1978, S. Rep. No. 95-1191, 95th Cong., 2d Sess., at 17-21 (September 13, 1978) (reporting favorably an amendment to exempt urgent letters from the postal monopoly); Subcomm. on Postal Operations and Services of the House Comm. on Post Office and Civil Service, Hearings on the Private Express Statutes, 98th Cong., 1st Sess., (13 November 1979) (House committee members expressing frustration with resistance to an exemption for urgent letters from the Postmaster General).

to whether the domestic postal monopoly extended to international mail (Justice Department); economic and competition policy (Office of Management and Budget, Justice Department, Department of Commerce); the public interest (Justice Department); and international competitiveness of American firms doing business abroad (users, Justice Department).

Responding to this opposition, the Postal Service in March 1986 withdrew the proposed anti-remail rule and announced its intention to propose an alternative pro-remail rule. 51 Fed. Reg. 9652 (March 21, 1986). The withdrawal announcement included a statement by John R. McKean, Chairman of the Postal Service Board of Governors which emphasized that:

Congress entrusted us with this monopoly not for our own benefit but in order to let us better serve the American people. The critical question raised by this rulemaking is whether enforcement of the monopoly in this context would advance or retard consumer welfare and the interests of this nation.

It is the sense of the Board that private sector competition with the Postal Service in the provision of international remail services can - and already does - produce significant benefits to the public. Ultimately even the Postal Service itself can benefit from this kind of competition.

* * *

The Board of Governors does not believe that any attempt to suppress this kind of competition would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people.

51 Fed. Reg. at 9853.

On June 17, 1986 the Postal Service proposed a new rule suspending the PES "to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States." 51 Fed. Reg. 21,929 (June 17, 1986). The Department of Justice "strongly endorsed" the proposed regulation as "based on an ample factual record that demonstrates that competition in international remail is in the public interest."²

The only opposition to the new remail rule came from the postal employees' Unions. However, apart from allegations that "APWU and NALC members are directly affected in their employment opportunities, and as members of the public and users of the mails," the Unions confined their comments to legal arguments regarding the PES, the public interest requirement in the suspension provision and the quality of the administrative record. Rather than offer evidence of harm to the public interest, the Unions sought delay for further study by the Postal Service.³

The remail rule issued on August 20, 1986 substantially as proposed. 51 Fed. Reg. 29,636.

2. Decisions Below

On November 25, 1987 the Unions filed suit in district court for declaratory and injunctive relief against enforcement of the international remail rule on grounds that the Postal Service had acted arbitrarily and capriciously in adopting it. The district courts have original jurisdiction over suits against the Postal Service under 39 U.S.C. §409 (1982).

² Comments of the United States Department of Justice at 3, 6 (July 17, 1986).

³ The record before the Postal Service included a detailed, and unrebutted, analysis by the International Remail Committee that suggested the net loss of postal revenue from international remail was insignificant, amounting to no more than \$3 million per year in 1985. Comments of International Remail Committee, pp. 38-45 (December 12, 1985).

On December 20, 1988 the district court granted the Postal Service's motion for summary judgment in which intervenor ACCA had joined, App. 28a. Judge Richey held that, while the Unions had Article III standing, they nonetheless lacked standing to sue because they were not within the "zone of interest" of the PES. On the merits, the district court held that even if the Unions had standing, (1) the Postal Service had not exceeded its suspension authority under the Union's "heightened interpretation" of the 39 U.S.C. §601(b) "public interest requires" standard and (2) the remail rule was not arbitrary, capricious nor an abuse of discretion because the Service had "identified the factors supporting its decision, drawn rational inferences where detailed facts did not exist, and drawn a rational connection between the facts and the decision made." App. 37a. The Unions appealed.

On December 8, 1989, the court of appeals vacated summary judgment for the Postal Service. The District of Columbia Circuit held that the zone of interest of the PES, though dating back to 1792, had to be viewed in the context of the entire statutory framework of the 1970 Postal Reorganization Act (PRA). 39 U.S.C. 101 *et seq.*, Pub. L. 91-375 (August 12, 1970). The court then found that "a key impetus for the PRA appears to have been a nationwide work stoppage by postal employees which occurred in March 1970" and "[t]herefore a principal purpose of the PRA was to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees." App. 8a. This "interplay" between the PES and PRA persuaded the court "that there is an 'arguable' or 'plausible' relationship" between the PES's goal of universal postal service and the employment interests of the Unions. App. 8a-9a.

Alternatively, the court held that even without the interplay between the PES and PRA, the Unions would be in the zone of interest of the PES because "the revenue protective purposes of

the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities." *Id.* Therefore, the court concluded, the Unions have standing because their "interests are largely congruent with the purposes of the PES." App. 10a.

The court of appeals then found that the Postal Service applied too narrow an interpretation of the §601(b) public interest test by considering only the benefits of the international remail rule and only to the segment of the Postal Service's consumer base that engaged in international commerce. The court held that the Postal Service's "interpretation of the 'public interest' is not reasonable because it did not give sufficient attention to how revenue losses might affect cost and service of other postal patrons." App. 14a.

REASONS FOR GRANTING THE WRIT

This petition should be granted: (1) to resolve a specific conflict among the circuits as to the standing of postal employees' unions under the PES; (2) to clarify the controversy and confusion surrounding the "zone of interest" test that the decision below will exacerbate and that the concurring and lower court opinions of four current members of the Court have suggested should be clarified; and (3) because the interpretation of the public interest standard of the suspension provision of the PES presents an important issue of administrative law and procedure.

I.

CONFLICT AMONG CIRCUITS

There is conflict among the circuits on the issue of whether the Unions are within the zone of interest of the PES. The District of Columbia Circuit below and the Tenth Circuit have held yes, *National Association of Letter Carriers, AFL-CIO v.*

Independent Postal System of America, Inc., 470 F.2d 265 (10th Cir. 1972); *American Postal Workers Union v. React Postal Services, Inc.*, 771 F.2d 1375 (10th Cir. 1985); the Sixth Circuit rejects that conclusion:

It cannot be seriously contended that the Private Express Statutes was enacted for the protection of a class which included the postal employees or a union representing them.

American Postal Workers Union, AFL-CIO, Detroit Local v. Independent Postal System of America, Inc., 481 F.2d 90, 93 (6th Cir. 1973), *cert. dismissed*, 415 U.S. 901 (1974).

The Union's standing under the PES is an important question of federal law because the interests of the Unions are increasingly at odds with those of the Postal Service, postal patrons, private express couriers and thoughtful public policy and because the Unions will always be able to challenge such Postal Service suspensions in the District of Columbia Circuit.

Before the Postal Service proposed its 1985 anti-remail rule it had sought Justice Department action against remailers.⁴ The Justice Department declined to prosecute. Interpretation of the PES as protecting employment opportunities can only lead to additional litigation between the Unions and legitimate private competition that either has Postal Service approval or is believed by government enforcement officials not to violate the postal monopoly laws. Allowing the Unions to litigate where the government abstains, based on sound legal and competition policy considerations, will only serve to make lawful private competition with the Postal Service more expensive and disserve the interests of consumers.

⁴ Statement of Walter Duka, Assistant Postmaster General, Int'l Postal Affairs., to Postal Service Board of Governors, Tr. 49-50 (September 6, 1985).

II.

CLARIFY "ZONE OF INTEREST TEST"

There are two requirements for standing to challenge agency rulings: (1) the "injury in fact" test requires plaintiffs to show that they will be injured by the agency action in order to assure the courts that a real justiciable controversy exists under Article III of the Constitution, and (2) the zone of interest test, a "prudential" limitation, requires plaintiffs to show that they are among the class protected by the statute under which they sued to insure that Congress intended them to be "private attorneys general" to challenge agency action.⁵ Not everyone injured has a right to complain. The zone of interest test has generated substantial confusion and controversy.⁶

Some courts have limited the zone of interest to that defined on the face of the statutory provision under which suit was brought.⁷ This Court has permitted reference to expressions of Congressional intent contained elsewhere. In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970) it looked to the legislative history of a later statute. In *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388 (1987), the Court looked to the legislative history of an earlier statute. In both *Data Processing* and *Clarke*, the Court looked to related statutes that clarified the Congressional intent to limit competition and held that competitors were within the zone of interest to challenge agency actions that the plaintiffs contended would permit unlawful competition with them. *Clarke*, 479 U.S. at 403. In spite of *Clarke*'s narrow holding, the Court engaged in what three of the eight participating Justices referred

⁵ See *Community Nutrition Institute v. Block*, 698 F.2d 1239, 1256 (D.C. Cir. 1983) (Scalia, J. concurring in part and dissenting in part), *reversed* 467 U.S. 340 (1984).

⁶ *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388, 396 fn 11 (1987).

⁷ See e.g., *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 140 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086, (1978).

to in a concurring opinion as a "sweeping discussion" of the zone of interest test.

The court of appeals' reliance upon the "sweeping discussion" of the zone of interest test in *Clarke* raises three important issues concerning the application of the test that urge review and clarification by this Court: (1) when may the courts look beyond the statute under which plaintiff brings suit to determine whether Congress "arguably"⁸ intended that "a particular plaintiff should be heard to complain of a particular agency decision," 479 U.S. at 399; (2) what limits are there to the consideration of other statutes and other factors that the courts can look to for "all indicators helpful in discerning that intent," *id.* at 400; and (3) how remote may the plaintiff be from those directly affected and yet permit an inference that Congress intended such plaintiff to be within the zone of interest.

First, there was no need here for the court of appeals to look beyond the PES to discern its zone of interest. The district court quite properly noted "the 'interest' created by the PES is in maintaining sufficient revenue, by means of a monopoly, to permit the Service to serve the totality of the mail delivery market in the United States." App. 32a, fn 2. The court of appeals did not disagree. The D. C. Circuit articulated no need, let alone one based on legitimate concerns about ambiguity or change in statutory purpose, to look beyond the PES. The 1970 PRA revised Title 39 of the U.S. Code, but did not reenact, or otherwise disturb the basic prohibitions against private carriage

⁸ There is some question whether "arguably" remains part of the test. In his concurrence and dissent in *Community Nutrition*, Justice Scalia noted that in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982), then the Supreme Court's most recent recitation in a non-APA case, the Court omits the word "arguably" from the zone of interest formula. 698 F.2d at 1256. The *Clarke* majority relegates "arguably" to quotes of earlier formulations of the test and doubts the possibility of formulating a single inquiry. 479 U.S. at 400 fn. 16.

of letters, which have been located in Title 18 since 1909. See H. R. Rep. No. 91-1104 at 44 (May 19, 1970).

Second, even if there were reason to look beyond the PES, there are limits to what the lower courts may look to for indications of Congressional intent. While *Clarke* states that "all indicators helpful in discerning that intent must be weighed," 479 U.S. at 400, it refers elsewhere to "a relevant statute," *id.* at 396, and does not relax the requirement that such "relevant" statute have "an identity of purpose"⁹ or "a single unified purpose."¹⁰ See *Data Processing*, 397 U.S. at 155. The sweeping language in *Clarke* confused the court of appeals below into ignoring the limitations on the indicators it could consider to discern the zone of interest of the PES. The court erred in looking to the PRA, looking beyond the PRA to the "impetus" for it, and concluding that the undefined "interplay" between the PRA and the PES brought the Unions within the protected zone of the PES.

The labor reforms of the PRA, upon which the court relied for finding an "interplay" between the statutes, were enacted nearly two hundred years after the original postal monopoly provision that underlies the PES and for vastly different reasons.¹¹ As the district court noted, the PES were intended to

⁹ *Community Nutrition Institute v. Block*, 698 F.2d 1239, 1250 (1983), reversed on other grounds, 467 U.S. 340 (1984).

¹⁰ *Tax Analysts, supra.*, 566 F.2d at 141.

¹¹ A postal monopoly law was first enacted by the Continental Congress in 1782. See G. L. Priest, *The History of the Postal Monopoly in the United States*, 13 *J. Law and Economics* 33, 48 (1974). The current version of the postal monopoly law was first enacted in Act of June 8, 1872, ch. 335, 17 Stat. 283. No legislative material has been found to explain the particular monopoly language adopted. Since 1872, the prohibition against the private carriage of letters (18 U.S.C. §1896) has been reenacted twice, as part of general codifications of the Criminal Code. The first occasion was the Criminal Code of 1909, ch. 321, §§181, 183, 186, 35 Stat. 1124-25, in which

(footnote continued)

maintain sufficient postal revenues to allow nationwide service at uniform rates. The PRA's labor reforms, on the other hand, were enacted to increase productivity by eliminating the political patronage system that stifled the advancement and morale of postal employees.¹² Lacking a unity of purpose, the PRA is neither helpful nor relevant to discerning the zone of interest of the PES.

Moreover, the court below went beyond even the legislative history of the PRA to the "impetus" for the statute to broaden the zone of interest of the PRA to inject the Unions into the zone of interest of the PES. The court found that because "a key impetus for the PRA appears to have been a nationwide work stoppage by postal employees, a principal purpose of the PRA was to implement various labor reforms that would improve pay, working conditions and labor-management relations" App. 8a. Even if the court were correct in ascribing the "impetus" for the PRA, such judicially noticed impetus falls far short of any Congressional statement of legislative intent. In any event, while the contention that the purported impetus for the labor reforms was a work stoppage might arguably support the Unions' claims of standing to enforce those labor reforms, it begs the question of how enactment of the labor reforms bring the Unions within the zone of interest of the PES.

the prohibition was moved from the postal laws to the new criminal code. The only changes from prior law were alterations in style and the addition of the imprisonment penalty. See Special Joint Comm. on the Revision of the Laws, Revision and Codification of Law, Etc., S. Rep. No. 10, 60th Cong., 1st Sess., pt. 1. at 14-15, 20 (1908). The second codification was 18 U.S.C. §1696, ch. 645, 62 Stat. 777, in which only minor stylistic changes were made.

¹² See Report of House Committee on Post Office and Civil Service, Postal Reorganization and Salary Adjustment Act of 1970, H. R. Rep. No. 91-1104, 91st Cong. 2d Sess. (May 19, 1970) at 1-2; *People Gas, Light & Coke Co. v. United States Postal Service*, 658 F.2d 1182, 1196 (7th Cir. 1981).

The only "interplay" between the statutes that the court relies upon for merging their zones of interest appears to be the recodification of the civil code parts of the PES in the PRA. That is at best coincidental or ministerial. There is simply no "interplay" between the PES and the PRA that is "relevant" to shedding light on the Congressional intent underlying the PES. Neither the PRA nor its legislative history reveals any Congressional consciousness of any benefits of the PES to postal employees or any strategy to inject labor into the preservation of the postal monopoly.¹³

Indeed, the real "impetus" for, the legislative intent behind, and statutory scheme embodied in, the PRA, if anything, distances postal employees from any arguable zone of interest of the PES. The key impetus for the PRA was the 1968 Kappel Commission Report¹⁴ which recommended removing the Post Office from politics and operating it in an efficient, businesslike fashion. The opening lines of the report:

The United States Post Office faces a crisis. Each year it slips further behind the rest of the economy in service, in efficiency and in meeting its responsibilities as an employer. Each year it operates at a huge financial loss.

Kappel Report at 1. The Commission recognized the need for controlling costs by increasing productivity through automation, even if that meant a decline in employment. *Id.* at 3-6. As one commentator put it: "In the labor intensive Postal Service,

¹³ See also, *People Gas*, fn 12, *supra.*, 658 F.2d at 1196, ("Only the consumer interest in postal services is arguably within the zone of interest protected by the [Postal Reorganization] Act").

¹⁴ Report of the President's Commission on Postal Organization — entitled *Toward Postal Excellence* (June 1968), House Committee on Post Office and Civil Service, 94th Cong. 2d Sess., Comm. Print No. 94-25 (November 24, 1976) (Kappel Report).

controlling costs is synonymous with controlling *labor* costs...."¹⁵ Not surprisingly, "[t]he most powerful and concentrated opposition [to the PRA] came from postal employee unions." Tierney at 15.

In short, the D. C. Circuit erred in reading the PRA, a statute opposed by plaintiffs as limiting postal employment, to confer standing under the PES to protect or increase such employment.

Third, the court of appeals has gone beyond the holding in *Clarke* that competitors will have standing under the zone of interest test to enforce statutes limiting competition. The *Clarke* decision does not support extending the zone of interest to employees of competitors, to say nothing of employees of quasi-governmental competitors administratively opting for increased competition. Nevertheless, after straining to find indirect standing under its "interplay" test, the court concluded that the Unions would be within the zone of interest even without the interplay between the PES and PRA. App. 8a. That conclusion raises three questions: (1) why consult the purposes of the PRA, if the Unions were so clearly within the zone of interest of the PES? (2) why create an unnecessary, undefined new "interplay" test? and (3) how do postal employees, who are neither competitors, nor representatives of remote areas threatened with curtailed service come within the zone of interest of either the PES provisions designed to protect service to remote areas or the suspension provision which protects the public interest?

Judicial restraint would obviate unnecessary inquiry into the PRA and creation of an "interplay" test. The court of appeals answers the third question by resorting to an injury in fact analysis:

¹⁵ J. T. Tierney, *Postal Reorganization — Managing the Public's Business*, Auburn House (1981) at 51 (Tierney).

[C]ongressional intent to benefit the Unions is not required. That postal workers benefit from the PES's function in ensuring a sufficient revenue base, however, is scarcely deniable. Thus the Unions' interests arguably are within the zone of interests contemplated by the PES even when considered in isolation.

App. 9a. The court by defining the zone of interest, not by who Congress intended to enforce the statute or even intended to benefit, but instead by who is conceivably benefitted by the statute, reduced the zone of interest test to an inquiry into injury in fact.¹⁶ This interpretation of the zone of interest test bears no resemblance to this Court's prior decisions and has been criticized by one Justice of this Court in *Community Nutrition*. See fn 5, *supra*.

In sum, the D.C. Circuit's decision below has misinterpreted *Clarke* and is bound to cause further confusion about the application of the zone of interest test of standing,

¹⁶ The D.C. Circuit's premise that postal employees benefit from the PES suffers from three erroneous assumptions: (1) that the PES requires maximization of revenues; (2) that maximizing revenues necessarily maximizes employment opportunities; and (3) that, therefore, any competition with the Postal Service will necessarily diminish employment opportunities. Nothing in the PES, the PRA, or their legislative histories requires the Postal Service to maximize revenues. To the contrary, the PRA created the Postal Rate Commission to help implement and regulate a cost-based rate structure. See 39 U.S.C. §§3601, 3621-3627 (1970). Maximizing revenues does not maximize employment. Indeed, the PRA requires the Postal Service to give primary consideration to speed and efficiency in setting all postal policy. 39 U.S.C. §101(e). Thus, considerations other than employment levels have priority over how revenues are allocated. Therefore, increased competition from the remail industry, whatever its effect on revenues, will have no predictable effect on postal employment levels. See *United Transportation Union v. Interstate Commerce Commission*, 891 F.2d 908, 914 (D.C. Cir. 1989).

unless this Court clarifies the test and reverses the decision below.¹⁷

III. INTERPRET THE 39 U.S.C. § 601 PUBLIC INTEREST STANDARD

The second issue presented, interpretation of the suspension provision, is equally important. As the court of appeals noted, this case was the first occasion for an appellate court to interpret §601(b) in this context. 891 F.2d at 312. The Postal Service interpreted the public interest standard to have been met where it found the proposed remail rule to result in benefits to the general public, competition, see Statement of Chairman McKean at 6, *supra*, international competitiveness and remail users. App. 23, 24a. Without specifically articulating its interpretation of the public interest standard or any basis therefor in the PES or its legislative history, the court of appeals found the Postal Service's and district court's interpretation too "narrow." The court of appeals therefore erred in failing to give proper deference to the Postal Service's interpretation of the public interest standard. *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

¹⁷ The standing issue in this case is related to an issue pending consideration by the Supreme Court in *Department of Treasury v. Federal Labor Relations Authority*, cert. granted, ___ U.S. ___, 110 S.Ct. 47, 107 L.Ed.2d 16 (October 2, 1989). The question presented in that case is whether an agency's contracting out determinations made pursuant to Office of Management and Budget Circular No. A-27 are subject to grievance and arbitration under Title VII of 1978 Civil Service Reform Act if incorporated into a collective bargaining agreement. Thus, both cases deal with the deference to be accorded agency employees to challenge agency decisions permitting outsiders to perform tasks that the employees hope to preserve for themselves to protect their employment opportunities.

Apart from failing to justify its alternative interpretation of the public interest standard, the court of appeals' prescription is unsound and impractical, given the numerous types of service the Postal Service offers and types of customers it has. The court's construction would make any future rulemaking to suspend the PES into an unnecessarily drawn out, cumbersome and expensive proceeding.

The court of appeals' approach also violates the fundamental purpose of the PRA — operation of the Postal Service in more business-like fashion — and is at odds with the realities of institutional self-preservation. The Postal Service has every incentive to maintain the postal monopoly. On the centennial of the Sherman Act it is hardly debatable that the economic policy of this nation disfavors monopolies. When a monopolist may by law narrow its own monopoly and does so, it should be applauded instead of second-guessed. Rather than weighing down the suspension provision with considerations of the effect of a suspension on every conceivable special interest group of postal employees and patrons, the Postal Service should be presumed to be acting in the greater public interest when narrowing the scope of its own monopoly.

The burden should be on the party challenging any suspension provision to show a specific detriment to the greater public good. Such detriment should be one that is inconsistent with the goals of national economic integration underlying the PES. The Unions failed to offer any argument or factual support for any inconsistency between the remail rule and the public interest. Under these circumstances the Postal Service cannot be faulted for its consideration of the record before it, rather than some Platonic ideal of an administrative record it might have developed. Interpretation by the Supreme Court of the §601 public interest standard is an important question of federal law and administrative procedure.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 8, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 19, 1989

Decided December 8, 1989

No. 88-5436

AMERICAN POSTAL WORKERS UNION,
AFL-CIO, et al.,
Appellants

v.

UNITED STATES POSTAL SERVICE,
Appellee

Appeal from the United States District Court for the
District of Columbia

Keith E. Secular, with whom *Anton G. Hajjar* was on brief for
appellants.

Wilma A. Lewis, Assistant United States Attorney with whom
Jay B. Stephens, United States Attorney, *John D. Bates*, *R. Craig
Lawrence*, Assistant United States Attorneys and *Charles D. Hawley*,
Attorney, United States Postal Service were on brief for appellee.

Before: WALD, *Chief Judge*, and MIKVA and RUTH B.
GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

Concurring opinion filed by *Circuit Judge* RUTH B.
GINSBURG.

MIKVA, *Circuit Judge*: Appellants in this action challenge the
district court's grant of summary judgment for the United States Postal
Service ("USPS" or "Postal Service"). The district court found that
appellants lacked standing to seek review of a final order of the USPS
which suspended the Postal Service's statutory monopoly to allow
private entities to participate in a mail delivery market known as

international remailing. On the merits, the district court concluded that the USPS did not act arbitrarily, capriciously or beyond its statutory authority in promulgating the international remailing regulation. Appellants, the American Postal Workers Union, AFL-CIO and the National Association of Letter Carriers, AFL-CIO (collectively, "the Unions") assert that they are within the "zone of interests" implicated by the Private Express Statutes ("PES")—the statutes codifying the Postal Service's historic monopoly on the carriage of letters over postal routes. The Unions challenge the USPS's wholesale suspension of the international remailing restriction as arbitrary, capricious and not supported by a sufficient factual showing that the "public interest" required such suspension.

We agree. The district court correctly concluded that the Unions satisfy the requisites for article III standing. We find, however, that the district court erred in concluding that the Unions' interest in preserving employment opportunities bears no reasonable relationship to the purposes of the PES. Because the Private Express Statutes are an integral part of a comprehensive statutory scheme which clearly addresses the welfare and employment of postal employees, we conclude that the Unions are within the zone of interests of the PES. The USPS's suspension of the PES to allow unrestricted international remailing by private entities constitutes arbitrary and capricious agency action because the USPS did not develop a record to project the impact of the suspension on uniform postal rates and service. Consequently, we remand this case to the district court to vacate its order and allow the USPS to reopen its proceedings or take other action consistent with this opinion.

I. BACKGROUND

The Private Express Statutes historically have granted to the USPS a monopoly over the carriage of letters by prohibiting, with certain exceptions, private competition in conveying letters over postal routes. See 18 U.S.C. §§ 1693-1699, 1729 (1982); 39 U.S.C. §§ 601-606 (1982). The USPS may "suspend [the Private Express restrictions] upon any mail route where the public interest requires the suspension." 39 U.S.C. § 601(b). In 1979, the Postal Service exercised its authority under § 601(b) to suspend the PES for the carriage of

extremely urgent letters, otherwise known as express mail or overnight service. See 44 Fed. Reg. 61,181 (Oct. 24, 1979). As a result, private mail services began to rely on the urgent letter suspension to support the practice of "international remailing," or carriage of letters overseas for deposit into foreign postal systems—thus allowing users of this service to bypass completely the U.S. Postal Service. In October of 1985, the USPS announced its intention to amend the urgent letter suspension to limit sharply its applicability to international remailing. See 50 Fed. Reg. 41,462 (Oct. 10, 1985). This proposal was greeted with massive opposition from the business community and the disapproval of several members of Congress and senior executives in the Reagan Administration. Opponents argued primarily that preventing private remailers from offering inexpensive, speedy service would jeopardize the ability of American companies to compete for business abroad.

In March of 1986, the Chairman of the Postal Service's Board of Governors, John McKean, announced the USPS's intention to initiate another rulemaking proceeding "to remove the cloud that now hangs over the international remail services and preserve the benefits of desirable competition between the Postal Service and private companies." The USPS withdrew its earlier proposal and began considering whether to suspend the PES to allow international remailing. See 51 Fed. Reg. 9652 (March 21, 1986). Two rulemaking notices to this effect and a public meeting produced little additional factual information.

On August 20, 1986, the USPS published a final rule suspending the PES to permit unrestricted international remailing. See 51 Fed. Reg. 29,636. The regulation allows private carriers to deliver mail from the United States directly to foreign postal systems, bypassing the USPS, without meeting certain cost conditions that applied under the urgent letter suspension. See 39 CFR § 320.8 (1988). Responding to the Unions' complaint that the record was inadequate to support a "public interest" finding, the USPS stated:

The Postal Service ... sought ... to obtain precise and detailed information regarding the level of services provided by remailers, and the benefits which [their] customers . . . derive. It may well be, however, that

because of the diverse character of the remail industry and the relatively recent development of remailing, the comprehensive information we had hoped to receive to supplement the essentially anecdotal information, which was furnished to us, is not available. Nonetheless, the Postal Service has compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension.

51 Fed. Reg. 29,637 (Aug. 20, 1986). Indeed, in its final notice of proposed rulemaking the USPS had emphasized the sketchy nature of the factual record, referring to the "anecdotal character" of tables charting relative delivery times, the "imprecision of the data" on the need of U.S. businesses for private international remailing, and the presence of "little or no reliable information as to the amount of revenues diverted to date by the activities of remailers." 51 Fed. Reg. 21,931 (June 17, 1986).

The Unions filed suit in the district court, seeking declaratory and injunctive relief against enforcement of the international remailing regulation. The district courts have original jurisdiction over suits by or against the Postal Service. 39 U.S.C. § 409 (1982). Although the USPS is exempt from the strictures of the Administrative Procedure Act ("APA"), see 39 U.S.C. § 410(a), it has chosen to follow APA procedures when promulgating rules affecting the PES. See 39 CFR § 310.7 (1988). Therefore, the APA provides the appropriate standards for evaluating the procedural and substantive issues in this case.

Issuing a memorandum opinion, the district court granted the Postal Service's motion for summary judgment. Because the suspension threatened workers with the prospect of reduced employment opportunities, the court found that the Unions met the constitutional requirements for standing under Article III. The court concluded, however, that the Unions were not within the zone of interests implicated by the PES. Applying *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), the court reasoned that the Unions' interests bore no reasonable relationship to the purposes of the PES because those statutes were "designed to ensure only that the Service maintains sufficient revenue to be able to provide efficient and effective mail delivery services to all aspects of the market." In addition, the court

asserted that, in certain circumstances, the interests of the Unions might diverge from the purposes of the PES because Congress, in enacting the "public interest" exception, recognized that there might be situations in which the revenue objectives of the PES could be achieved without the benefit of a monopoly. Finally, the court concluded that a finding of standing in this case implicitly would afford standing "to any agency employee whose job or employment opportunities were threatened as a result of an agency decision."

On the issue of statutory authority, the court reasoned that the "public interest requires" language of § 601(b) conferred broad discretion on the Postal Service "to define the public interest in a given situation and to act accordingly." The court concluded that the suspension decision was made on a reasoned basis, rejecting the charge that the evidence was inadequate. While the court acknowledged "the relative dearth of empirical data" in the record, it relied upon court precedents which upheld agency decisions lacking factually specific support. See, e.g., *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-814 (1978) (factual specificity not always required where "a forecast of the direction in which future public interest lies necessarily involves deductions based upon the expert knowledge of the agency").

II. ANALYSIS

A. Standing

The law of standing is based on a set of constitutional and prudential requirements. To establish standing under article III of the Constitution a litigant must plead an injury in fact fairly traceable to the conduct complained of and likely to be redressed by the relief requested. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Prudential standing requires that the "plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982) (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (footnote omitted). That the Unions satisfy the constitutional requirements for standing is not in doubt. Allowing private international remailers to compete directly with the

Postal Service threatens postal workers with the prospect of reduced employment opportunities. See, e.g., *American Postal Workers v. React Postal Services, Inc.*, 771 F.2d 1375, 1380 (10th Cir. 1985) (“[W]henver a private entity is allowed to perform the tasks of collection, sortation, delivery, etc. in competition with the USPS, the employment opportunities of the postal workers are inevitably reduced.”). Such threatened injury is sufficient to satisfy the “injury in fact” prong of the test for article III standing. See *Valley Forge*, 454 U.S. at 472.

At issue in this case is whether the Unions’ interest in retaining employment opportunities satisfies the “zone of interests” test as iterated by the Supreme Court in *Clarke v. Securities Industry Association*, 479 U.S. 388, 399-400 (1987). The Unions’ cause of action derives from § 702 of the APA, which grants standing to a person “aggrieved by agency action within the meaning of the relevant statute.” 5 U.S.C. § 702 (1982). In *Clarke*, the most recent instruction from the Supreme Court on the subject, the Court acknowledged that the zone of interests test is a gloss on § 702 of the APA that provides some limits on access to the courts. The *Clarke* Court, however, in several places admonished this circuit and others in general for a somewhat parsimonious approach to the law of prudential standing, stating that “there need be no indication of a congressional purpose to benefit the would-be plaintiff.” 479 U.S. at 399-400 & n.15. Again, the Court asserted that the test “is not meant to be especially demanding,” and that there need be only “a plausible relationship” between the interests propounded by the plaintiff and the policies undergirding the statutory framework. Pp. 396, 399, 403. Finally, the Court reaffirmed an established presumption in favor of judicial review. Would-be plaintiffs should be allowed into courts unless they are “not even ‘arguably’ within the zone of interests to be protected or regulated by the statute.” P. 397 (emphasis added, citation omitted). This presumption would seem to operate with particular favor for those plaintiffs that satisfy the constitutional requirements for standing.

As the *Clarke* Court explained, the zone of interests test serves as our guide for deciding whether “in view of Congress’ evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency action.” P. 399. In cases such as this, where the would-be plaintiff is not the subject of

the contested regulation, the test denies standing only if “the plaintiff’s interests are so *marginally related* to or *inconsistent* with the purposes *implicit* in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” P. 399. (emphasis added).

Turning to the circumstances of this case, we are easily convinced that the Unions’ concerns have more than a “marginal” relationship to the purposes implicit in the PES. The district court erred in focusing too narrowly on the functions of the PES in isolation from the entire Postal Reorganization Act of 1970 (“PRA”), of which the PES are a part. When attempting to discern the scope of interests embraced by a particular legislative provision, courts may look to the purposes animating the entire statutory framework. See *Clarke*, 479 U.S. at 401 (“[W]e are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress’ overall purposes in the National Bank Act.”); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 & n.2 (1970); see also *National Coal Association v. Hodel*, 825 F.2d 523, 529 (D.C. Cir. 1987) (looking beyond the Federal Land Policy and Management Act of 1976 (FLPMA) to other legislation aimed at the coal industry in order to “flesh out the meaning of the term ‘public interest’ ” in the FLPMA); *Wilderness Society v. Griles*, 824 F.2d 4, 18 n.11 (D.C. Cir. 1987) (“Thus, plaintiffs ... appear to fall within the zone of interests of the statutory scheme represented by three complementary enactments.”).

This court’s approach in *National Coal Association* is instructive. In that case, § 206 of the FLPMA authorized the Secretary of the Interior to dispose of public lands by exchange where “the public interest” would be well served. In order to “flesh out” the meaning of the term “public interest” for prudential standing purposes, the court looked not only to the language and purposes of the FLPMA but also to the concerns informing separate legislation having related objectives. *National Coal Ass’n*, 825 F.2d at 529.

An examination of the function of the PES in advancing the goals of the entire PRA demonstrates the relevance of the PRA to our zone of interests inquiry. The PRA revamped the nation’s postal system, rendering the Postal Service politically independent by endowing it with financial and budgetary authority previously confided in Con-

gress. In enacting the PRA, Congress incorporated without substantive modification private express provisions which originate from a statute passed in 1792, when Congress first embraced the concept of a postal monopoly. See Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236. In Section 7 of the PRA, Congress directed the new Postal Service to reevaluate the PES and report on the continuing need for a postal monopoly. In 1973, the Board of Governors submitted the requested report, concluding that "the basic protections of the Private Express Statutes must be retained if this country is to continue to have effective universal mail service reaching into every community and serving all parts of the nation." Board of Governors, *Statutes Restricting Private Carriage of Mail and Their Administration*, Comm. Print No. 93-5, 93d Cong., 1st Sess. 1 (June 29, 1973). Thus, the PES, which continue the postal monopoly, play a pivotal role in achieving an important purpose of the PRA: to "provide prompt, reliable, and efficient services to patrons in all areas and ... render postal services to all communities." 39 U.S.C. § 101.

A key impetus for the PRA appears to have been a nationwide work stoppage by postal employees which occurred in March, 1970. See H.R. Rep. No. 1104, 91st Cong., 2d Sess. 3 (1970). Therefore, a principal purpose of the PRA was to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees. See *id.* at 2-4, 13-14. The Postal Service asserts that the other statutory provisions of the PRA should be looked to only if they bear some relationship to the purposes of the PES. Yet, to assess whether the Unions fall within the zone of interests of the PES we need not create nice distinctions between the PES and the PRA where Congress itself did not. As the *Clarke* Court made clear, the presumption in favor of judicial review is overcome only when "congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" 479 U.S. at 399 (quoting *Data Processing*, 397 U.S. at 157). The legislative history of the PRA leads inexorably to the opposite conclusion. The Unions' asserted interest is embraced directly by the labor reform provisions of the PRA. The PES constitute the linchpin in a statutory scheme concerned with maintaining an effective, financially viable Postal Service. The interplay between the PES and the entire PRA persuades us that there is an "arguable" or

"plausible" relationship between the purposes of the PES and the interests of the Union.

We are equally convinced that the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities. The PES were designed specifically to prevent private mail services from "cream-skimming" the most profitable mail services by undercutting the Postal Service on low cost, high-profit routes, thereby leaving the Service with less revenue to fulfill the requirement of providing service throughout the nation at uniform rates. Doc. No. 1, 28th Congress, 1st Sess. 596 *et seq.* (December 2, 1843), quoted in J. Haldi, *Postal Monopoly: An Assessment of the Private Express Statutes* 9 (1974); 39 U.S.C. § 101, § 3623(d); see also *Regents of the Univ. of California v. Public Employment Bd.*, 108 S.Ct. 1404, 1408 (1988) ("Because Congress desires 'prompt, reliable, and efficient services to [postal] patrons in all areas,' it has enacted the Private Express Statutes and has provided for nationwide delivery of mail at uniform rates.") (citations omitted). As stated above, congressional intent to benefit the Unions is not required. That postal workers benefit from the PES's function in ensuring a sufficient revenue base, however, is scarcely deniable. Thus the Unions' interests arguably are within the zone of interests contemplated by the PES even when considered in isolation. The district court's reasoning that there may be circumstances in which the interests of the Unions will diverge from the purposes of the PES, exacts too demanding a standard for meeting the zone of interests test. The relationship of the plaintiff to the statute need only be arguable, not wholly coincident. Instead of requiring an *a priori* showing that no conflicts could possibly ensue from a grant of standing, the zone of interests inquiry only "seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke*, 479 U.S. at 397 n. 12.

The PES reflect a congressional presumption that a postal monopoly will be maintained to the extent necessary to ensure universal service at uniform postal rates. Hence the Unions would seem to be appropriate plaintiffs to vindicate Congress' intent that the USPS reduce the scope of this monopoly only when clearly required by the public interest. This reasoning accords with an earlier decision of this circuit which found a union to be an appropriate challenger of agency

action involving a statutory guarantee of a domestic monopoly. See *Autolog Corporation v. Regan*, 731 F.2d 25, 30 (D.C. Cir. 1984) (union representing American seamen was within the zone of interests of the coastwise laws which create a monopoly for domestic shippers, because such laws protect the livelihood of union members). Similarly, an association representing the interests of business owners licensed to operate in a particular industry is within the zone of interests of a law that restricts entry of would-be competitors into that industry. See *Panhandle Producers and Royalty Owners Association v. Economic Regulatory Administration*, 822 F.2d 1105, 1109 (D.C. Cir. 1987) (“[O]ne need not be a cynic to understand competitors’ success in seeking to enforce licensing barriers: their interests are generally congruent with a statutory purpose to restrict entry.”).

We emphasize that this case is in a different genre from *National Federation of Federal Employees v. Cheney*, No 88-5271, slip op. (D.C. Cir. August 25, 1989). In that case a union contested a United States Army decision to “contract out” to private contractors the services previously provided by federal employees at the Directorate of Logistics in Fort Sill, Oklahoma. The majority found that the union did not fall within the zone of interests of any of the three statutory schemes at issue, either because the legislative history of the statute did not indicate “that Congress contemplated in-house federal employees or federal employee labor unions” as a particular class of plaintiffs to be relied upon to challenge agency disregard of the law, *id.* at 11, or because the interest asserted by the union was antithetical to the pro-competitive objectives of the statute. *Id.* at 22, 25. In contrast, the legislative history of the PRA reveals a clearly expressed concern for the welfare and employment conditions of postal workers. More importantly, the PRA codified a postal monopoly dating back to the late eighteenth century. Unlike the contracting-out provisions at issue in *NFFE v. Cheney*, the presumption established by the PES is against allowing private competition. For this reason the Unions’ interests are largely congruent with the purposes of the PES.

In light of the special emphasis which the PRA places on the welfare of postal employees and the unique role of the PES in maintaining the financial viability of the Postal Service, we must reject the district court’s conclusion that affording standing in this case implicitly would grant standing under § 702 to any agency employee

whose employment opportunities were threatened as a result of an agency decision. We recognize that agencies frequently face decisions which could result in reduced employment opportunities for their employees. The Postal Service, however, is charged with the responsibility of preventing unwarranted dissipation of an historic postal monopoly. Congress has imposed an obligation, largely congruent with the interests of postal employees, that is much stronger than those embodied in most statutory schemes under which disgruntled agency employees might sue. Contrary to the district court’s implication, “standing is not to be denied simply because many people suffer the same injury.” *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973).

The Unions alternatively claim standing as users of the mails. Because we find that their interest in retaining employment opportunities falls within the zone of interests of the PES, we need not resolve this claim.

B. The Merits

The USPS’s decision to suspend completely the PES with respect to international remailing rests chiefly on its finding that this would benefit American businesses by providing them with faster, cheaper service — thereby enhancing their ability to compete in international markets. In its notice of final rulemaking, the USPS conceded that much of the evidence in support of these benefits was testimonial in nature, but the Service was persuaded by the virtual unanimity of the comments offered by businesses using the services of private remailers. See 51 Fed. Reg. at 29,637 (Aug. 20, 1986). Although the USPS did not discuss revenue impact in its final notice, it did conclude in an earlier notice of the proposed suspension that the total potential loss of revenues — \$882 million, representing all revenues from international mail in 1985 — would not be “so adverse to the Postal Service as to outweigh allowing remailing to continue by virtue of the [proposed] suspension.” 51 Fed. Reg. at 21,931 (June 17, 1986).

The Unions offer three core arguments to challenge this rulemaking as arbitrary and capricious. First, they contend that none of the factors relied upon by the Postal Service represents a legitimate rationale for suspending the PES. Second, they aver that the alleged benefits are not supported by concrete evidence in the record. Third,

they argue that the Postal Service rejected without explanation more "tightly drawn and narrowly restricted" alternatives in favor of the broadest possible suspension, permitting all forms of international remailing.

The scope of judicial review of agency action for arbitrariness and caprice is narrow. A reviewing court cannot substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). In order to guard against agency inferences that are "arbitrary," however, the court must engage in a "thorough, probing, in-depth review" of the agency's asserted basis for decision, ensuring that "the agency ... [has] examine[d] the relevant data and [has] articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.' " *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Our task is rendered more difficult in this case by the sweeping nature of the "public interest requires" standard for justifying suspensions. The district court reasoned, and the Postal Service echoes, that by using this language in § 601(b), Congress vested the Service with the discretion to "define the public interest in a given situation and to act accordingly." While this appears to be the first occasion in which an appellate court has interpreted § 601(b) in this context, we are not without the guidance of numerous court opinions interpreting similar "public interest" language often used by Congress in giving regulatory agencies their marching orders. *See, e.g., Central Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 314-15 (D.C. Cir.), *cert. denied*, 474 U.S. 1019 (1985) (describing the Interstate Commerce Commission's broad authority to allow certain exemptions when in the "public interest" as "a congressional charge to 'go forth and do good'"). The district court relied on a single Supreme Court case, *FCC v. WNCN Listeners Guild*, which held that the "public interest, convenience, and necessity" standard governing the FCC's licensing authority conferred broad discretion on that agency to implement its view of the public interest standard "so long as that view is based on consideration of permissible factors and is otherwise reasonable." 450 U.S. 582, 593-94 (1981) (quoting *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978)). Yet, as

the preceding passage shows, a "public interest" standard does not confer *unfettered* discretion on the agency administering it.

As in *WNCN Listeners Guild*, the term "public interest" is not defined in the Private Express Statutes. We have no doubt that Congress intended to confer a substantial degree of discretion on the USPS. The scope of that discretion is a matter of statutory interpretation. In the "pre-Chevron" era the Supreme Court stated that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purpose of the regulatory legislation." *NAACP v. FPC*, 425 U.S. 662, 669 (1976). In *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court clarified the standard of review applicable to an agency's interpretation of the statutes it administers. This court has aptly summarized the *Chevron* analytical framework:

We first examine the text of the implicated statute and, where appropriate, its legislative history; using traditional tools of statutory construction, we seek to determine whether and how Congress resolved specific issues of law raised in the proceeding under review, and confine the agency to consistency with Congress' intent. If we find that Congress did not clearly resolve those issues, however, we must accept the agency's interpretation *so long as it is reasonable* — i.e., "rational and consistent with the statute."

Midtec Paper Corporation v. United States, 857 F.2d 1487, 1496-97 (D.C. Cir. 1988) (citing *NLRB v. United Food & Commercial Workers Union, Local 23*, 108 S. Ct. 413, 421 (1987); *Chevron*, 467 U.S. at 842-45) (emphasis added). In cases such as this, where Congress has assigned broad authority to an agency — specifying only that a non-defined "public interest" requires agency action — this court has applied the second prong of the *Chevron* analysis, upholding agency interpretations where reasonable. In our view, *Chevron* reasonableness review of an agency's interpretation of a "public interest" standard is not empty rhetoric; it is intended to have a limiting effect on the range of agency discretion. *See, e.g., Midtec Paper*, 857 F.2d at 1500 ("In order to support its exercise of discretion, the agency must provide

a reasoned analysis that is not manifestly contrary to the purposes of the legislation it administers.”); *Central & Southern Motor Freight*, 757 F.2d at 321 (“[E]xceptions to a statute are not to be construed in such a manner that they ‘defeat rather than further the purpose of Congress.’”).

Although we recognize the broad discretion conferred upon the agency, we believe that its apparently narrow interpretation of the “public interest” in this case frustrates the core purpose of the PES. The Postal Service considered only the benefits which apparently would redound to a single segment of the Service’s consuming public: businesses engaged in commerce overseas. In the context of the purposes of the PES, the USPS also should have considered the impact of the proposed suspension on those consumers who would continue to use the Postal Service, both from a price and service perspective. Indeed, as stated above, the fundamental purpose of the PES is to prevent private competitors from “cream-skimming” profitable routes, thereby providing the Postal Service with sufficient revenue to fulfill its mandate of providing service throughout the nation and at uniform rates. The USPS’s interpretation of the “public interest” is not reasonable because it did not give sufficient attention to how revenue losses might affect cost and service of other postal patrons.

The USPS’s own analysis in accepting the urgent letter suspension supports our reasoning. The Service limited that suspension to mails meeting prescribed “loss of value” or “cost” conditions because

[t]his [measure] is designed to protect the postal system against the inroads or “cream-skimming” by private couriers solely on the basis of their ability to undercut postal rates selectively. It is intended to test whether the shipper looks to a private carrier because he genuinely attaches an importance to prompt delivery, or simply because he desires to reduce shipping costs selectively. *If selective cost savings were sufficient grounds to use a private courier to carry letters, the Private Express Statutes would be effectively nullified.*

44 Fed. Reg. 40,076 (July 9, 1979) (emphasis added). Despite the soundness of this reasoning, the USPS proceeded in this case to ignore

it, indeed to contravene it directly, by justifying an unqualified suspension solely on the selective cost and service benefits to businesses engaged in international commerce. This approach is unreasonable, arbitrary and capricious. *Cf. Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1091-92 (D.C. Cir.), *cert. denied*, 108 S. Ct. 1088 (1988) (holding that agency administering a “public interest” standard did not engage in reasoned decisionmaking when it focused only on the economic impacts accruing to one segment of the power consuming public).

The Postal Service replies that it did consider revenue impact by factoring into its analysis (although not in its final rulemaking) an estimate of the total potential loss of revenue from an unrestricted international remailing suspension. Again, the only public “impact” which the Service assessed was the selective cost savings and service benefits to the business sector. Given that such selective evidence is not, without more, a sufficient justification for a suspension, a cursory, lump-sum analysis of the potential revenue loss hardly amounts to a reasoned assessment of the impact on uniform postal rates and service. Such tepid reasoning makes it impossible for this court to discern whether the suspension is indeed reasonable or consistent with the purposes of the PES. The Unions argue, for example that international mail rates have increased substantially as a result of the “skimming” of volume of international remailers pursuant to the urgent letter suspension). Yet no analysis even approaching such specificity was undertaken by the Postal Service in its rulemaking below.

Contrary to the urging of the Unions, however, this court may not impose its own rigid interpretation of the “public interest.” We are unwilling to say that the USPS may not consider the benefits of a proposed suspension to businesses engaged in commerce abroad, including their enhanced competitiveness in the international arena. Neither are we willing to say that there are no circumstances in which the Service could justify a suspension to allow unrestricted international remailing. The Unions are correct in asserting, however, that where several more narrowly defined suspension alternatives were under consideration, the USPS acted arbitrarily and capriciously in not explaining its reasons for rejecting these alternatives. *See International Ladies’ Garment Union v. Donovan*, 722 F.2d 795, 815-18 (D.C. Cir.), *cert. denied*, 469 U.S. 820 (1984). The Postal Service submitted

to the district court a declaration of Charles D. Hawley, its Assistant General Counsel, which provides reasons as to why the alternatives were rejected. Even if these reasons are accurate, this court "may not accept [agency] counsel's *post hoc* rationalizations for agency action.... [A]n agency's action must be upheld ... on the basis articulated by the agency itself." *Motor Vehicle Mfrs.*, 463 U.S. at 50.

Finally, because we find that the USPS did not engage in reasoned decisionmaking due to its insufficient attention to the impact of the suspension on all postal patrons, we need not reach the question of whether the evidence of the selective benefits to the business community was sufficient. We note merely that agencies are entitled to engage in predictive judgments of the future public interest and that a "complete factual support" is not required where such predictions "necessarily involve[] deductions based on the expert knowledge of the agency." *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978). Yet, agencies are not free to engage in unreasoned decisionmaking. Specifically, agencies cannot "ignore important factors in making predictions, or ... reach judgments that are irrational given the relevant evidence in the record." *International Ladies Garment Union*, 722 F.2d at 821 n.56.

III. CONCLUSION

We find that a faithful application of the recent teachings of the Supreme Court on prudential standing establishes that the Unions clearly fall within the "zone of interests" of the Private Express Statutes. Although the Postal Service may be able to justify a wholesale suspension of the PES with respect to international remailing, we conclude that the record before us does not reflect sufficient consideration of the core purposes of the Statutes. Because the impact of the proposed suspension on all of the Postal Service's patrons was never seriously considered and because the USPS failed to explain why narrower alternatives were rejected, the rulemaking was arbitrary and capricious in violation of the APA. 5 U.S.C. § 706(2)(A). We therefore remand to the district court to vacate the grant of summary judgment and to allow the agency an opportunity to reopen its proceedings or take any other action consistent with this ruling.

It is so ordered.

GINSBURG, RUTH B., *concurring*: While I concur in the court's opinion, I write separately to highlight a disturbing facet of this case. The Postal Service, as the historical record confirms, initially sought to maintain tight restraints on international remailing by private carriers. See 50 Fed. Reg. 41, 462 (Oct. 10, 1985). Its effort to confine the practice encountered the concerted opposition of the business community and the Department of Justice. In a *volte-face*, the Service then devised a rule broadly permitting international remailing. I agree with my colleagues that the Service did not draw from the rulemaking record reasons adequate to justify its action. I emphasize, however, that the Service, in accounting for its action, did not home in on comments in the record emphasizing that international remailing is different from domestic mail service, and suggesting that private competition in the international remailing market can be cordoned off safely without opening the way for seriatim inroads on the Postal Service monopoly.¹ On remand, the Service could focus its sights more precisely on the international/domestic mail delivery differential.

In finding that the public interest requirement was met in this case, the Service rested on "almost universally consistent ... observations" that remailing was faster and cost less than U.S. airmail. 51 Fed. Reg. 29,636, 29,637 (Aug. 20, 1986). These savings in time and cost, the Service found, "enhanc[ed] the ability of American firms to compete abroad." *Id.* In conclusion, the Service acknowledged comments favoring allowance of international remailing operations made by the Department of Commerce, the Department of Justice, and the Office of Management and Budget. *Id.* The Postal Service monopoly would quickly crumble, however, if the public interest required suspension of the Private Express Statutes whenever a private carrier could serve U.S. businesses faster and at a lower price. Commenters accordingly featured something more. Because international mail is distinct and separable from stateside postal operations, they reasoned, the international remailing permission at issue would leave intact the solid core of the monopoly decreed by Congress.

¹ The remailing service at issue raises no question under international mail reciprocity agreements, as counsel for appellants conceded at argument. *But see* Reply Brief of Plaintiffs-Appellants at 9. Foreign governments would not have the problem of dealing with multiple originating mail suppliers, for the remailers simply deposit the letters they carry in the mails of foreign postal administrations.

Commenters stressed this key point: the domestic monopoly leaves all mailers in the same boat, but extending that monopoly to the international arena put U.S. businesses at a marked disadvantage relative to their foreign competitors. *See* Joint Appendix (J.A.) at 124, 137, 138, 164. Commenters further observed that outgoing international mail imposes on the Postal Service far fewer capital and operational costs than does domestic mail. The Postal Service simply packages overseas missives and puts them on a ship or plane; a foreign postal service does the delivery work. There are no "small towns" to be served by the Postal Service at great cost. *See* J.A. at 143, 306, 373. The cost-of-service differential suggests that, in comparison to the domestic arena, a monopoly in the international domain is less vital to the Private Express Statutes' goal of assuring universal, affordable service.

Similarly, and of special relevance to the union's concerns, commenters noted that the Postal Service freight forwarding operation for international mail is not labor intensive; therefore, these commenters said, international remailers posed no large threat to postal jobs. J.A. at 149. Furthermore, comments emphasized the limited character of the service at stake: international remailers deal with bulk mailings for large business mailers. J.A. at 210.

In sum, the comments invited close attention to the question whether international mail should be distinguished from domestic mail in implementing legislation, the Private Express Statutes, designed to "bind the Nation together" through universal service at a uniform price. *See* J.A. 305. That question could be pivotal in the further examination this court has ordered.²

² Some commenters, most notably the Department of Justice, questioned whether Congress intended to grant the Postal Service a monopoly over international mail as well as domestic mail. *See* J.A. at 196-202; *see also id.* at 261, 395, 473, 516, 640. In view of the firm position of the Postal Service that the Private Express Statutes apply to international shipments of letters, *see* 51 Fed. Reg. 21,929, 21,930 (June 17, 1986), lower courts properly reserve this question for legislative clarification. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

Postal Service 39 CFR Part 320

Restrictions on Private Carriage of Letters; Suspension of the Private Express Statutes; International Remailing

AGENCY: Postal Service.

ACTION: Final Rule.

SUMMARY: This final rule suspends the operation of the Private Express Statutes, 18 U.S.C. 1693-1699, 39 U.S.C. 601-606, with respect to international remailing so as to permit the private, uninterrupted carriage of letters from the United States to a foreign country for ultimate delivery outside of the United States.

EFFECTIVE DATE: September 19, 1986.

FOR FURTHER INFORMATION CONTACT: Charles D. Hawley (202) 268-2971.

SUPPLEMENTARY INFORMATION: On June 17, 1986, the Postal Service proposed to suspend the Private Express Statutes to permit "international remailing." The adoption of this rule completes a public rulemaking process that began with the publication of a Notice of Proposed Rulemaking in October 1985.

"International remailing" consists of the carriage by private firms of shipments of letters, addressed to persons outside the United States, entirely outside of the United States Mails to foreign countries where the letters are deposited into the mails of foreign postal administrations.

The proposal published in the Federal Register of October 10, 1985, 50 FR 41462, would have amended the regulation establishing the administrative suspension of the Statutes for extremely urgent letters, 39 CFR 320.6, so as to make clear that this suspension, which had not been intended to authorize remailing, did not in fact do so. Most of the comments submitted in response to the notice opposed the proposal, and instead supported the practice of remailing. Subsequently, on March 4, 1986, the Chairman of the Board of Governors of the Postal Service announced that the Postal Service would commence a new rulemaking proceeding to establish the lawfulness of remailing.

On March 21, 1986, the Postal Service published a Federal Register notice which withdrew the October 10, 1985 proposed rule, and solicited information on the nature and extent of remailing and on the benefits derived by the public from this practice. 51 FR 9852. In addition, the Postal Service, following the close of the period established for response to the March 21 solicitation, held a public meeting on May 22, 1986.

(Notice of this meeting was published on May 12, 1986, 51 FR 17366). The information garnered in the successive steps described above forms the factual record upon which the Postal Service based the proposal, in the Federal Register on June 17, 1986, to permit remailing.

Nine additional comments were submitted in response to the June 17 notice. Eight of the comments expressed support for the proposal. Five expressed general support for the suspension and did not suggest any specific changes; three suggested that the suspension be modified in various ways. After careful consideration of all the comments, including those submitted in previous, related proceedings, the Postal Service, also bringing to the process its knowledge of and experience with the international mails, has concluded that the proposed suspension should be adopted without substantial modification. The statement of the purpose of this rule and the basis for it, which was published in the June 17 notice, and also the March 21 notice, are incorporated herein and form integral parts of this notice.

Applicability of Private Express Statutes to International Remailing

Two of the comments submitted in response to the June 17 notice, although generally supporting the proposal, raised the threshold questions of whether the Private Express statutes have any applicability to the international carriage of letters and whether the Postal Service has the authority to adopt a suspension to regulate the international private carriage of letters. These questions had been raised in the earlier comments and were carefully considered at that time. The Postal Service reiterates its statement on these questions which was published in the June 17 notice.

On the matter of the authority to regulate international remailing, one comment contended that this power should be vested in the

Executive Branch, in particular the Department of Justice, and not the Postal Service. The comment also suggests that rather than adopting a regulation, the proposed suspension should be recast as a statement of general policy. In adopting the suspension, however, the Postal Service is acting pursuant to authority specifically and exclusively delegated to it by Congress in the Private Express Statutes themselves, 39 U.S.C. 601(b). The Postal Service is also empowered under 39 U.S.C. 401(2) to adopt, amend, and repeal regulations in order to further the objectives of title 39. *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824, 826 n.5 (D.C. Cir. 1979). This title, of course, includes the statute noted above which authorizes the suspensions. Finally, the Postal Service is itself an independent establishment in the Executive Branch, 39 U.S.C. 201, and as such it is generally not responsible to other Executive Branch agencies in promulgating postal regulations. Nonetheless, the Postal Service has solicited the views of various agencies and has received and considered comments on these proposals from several agencies.

Nonapplicability of Suspension for Extremely Urgent Letters to Remailing

Several comments noted that in adopting a new suspension for remailing the Postal Service is implicitly concluding that the suspension for extremely urgent letters, 39 CFR 320.6, ought not be interpreted as itself permitting remailing. While two comments agreed with this rationale, a third requested that this interpretation be expressly repudiated. The Postal Service, by adopting this suspension for international remailing, has expressly and forthrightly determined that the practice will be permitted, and has stated the conditions under which it will be permitted. The Postal Service has also concluded that remailing need not be sanctioned under the color of a suspension which was intended for another purpose.

Prohibition on Ultimate Delivery Within the United States

One comment objected to the provision which requires that letters carried pursuant to the suspension not be ultimately delivered within the United States. The comment contends that this provision should not be adopted because remailing back into the United States

is negligible, and because this limitation is said to prevent Americans from availing themselves of lower postage rates that are offered to non-Americans. These objections are not persuasive, as explained in the June 17 notice.

The new suspension is not intended to allow the practice of mailing, in a foreign country, matter which is subsequently shipped by the postal administration of that country through the United States as open or closed transit mail, under circumstances which cause the United States to incur expenses for which it is not reimbursed. This caveat does not prohibit the private carriage of letters for remailing if that carriage is within the terms of the new suspension, but neither does the suspension limit the remedies available to the Postal Service with respect to transit mail.

Inspections and Audits

With regard to subsection (c) of the suspension, one comment suggested that this provision should be modified to include inspection and audit guidelines, and also to include a requirement that the Postal Inspection Service provide the shipper with advance notice of an inspection or audit, absent reasonable cause to suspect activity not in conformity with the regulation. Another comment advanced the view that subsection (c) should not be adopted because it exceeds the authority of the Postal Service. The Postal Service has concluded that the suggested inclusion of special inspection and audit guidelines in this regulation is unnecessary because these are well established functions of the Inspection Service. The authority of the Postal Service to investigate postal offenses and civil matters relating to the Postal Service is specifically provided by statute, 39 U.S.C. 404(a)(7). We note, moreover, that a similar provision has been included previously in a suspension of the Statutes. See 39 CFR 320.6(e), and compare 39 CFR 320.3(d). The Postal Service has, however, determined that wording in subsection (c) should be modified to read:

The failure of a shipper or carrier to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service... This minor modification makes it clear that it is the Postal Inspection Service which authorizes and conducts the inspections and audits.

The Factual Record as Supporting the Suspension

The comment opposed to adoption of the suspension asserted that the record is inadequate to support the adoption of the regulation, and that it is not manifest from the record that the public interest requires the establishment of the suspension. The Postal Service had sought, in its notice of March 21, 1986, and subsequently, to obtain precise and detailed information regarding the level of services provided by remailers, and the benefits which the customers of the latter derive. It may well be, however, that, because of the diverse character of the remail industry and the relatively recent development of remailing, the comprehensive information we had hoped to receive to supplement the essentially anecdotal information, which was furnished to us, is not available. Nonetheless, the Postal Service has compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension.

The factual record includes the comments received in response to the October 10 and June 17 notices. Information was also obtained in response to the Federal Register notice of March 21, which reprinted and addressed generally a letter, dated March 14, 1986, sent to commenters who responded to the October 10 notice, soliciting further information for the record. The transcript of the public meeting held May 22, 1986 is also part of the record.

The comments came primarily from American commercial enterprises, including financial institutions and publishers, that use the services of international remailers in conducting their business abroad. The comments were almost universally consistent in their observations regarding the level of service provided by remailers. Specifically, the comments asserted that remailing was faster than U.S. airmail and that this time savings is often critical to the ability of American businesses to compete in foreign markets. Moreover, the comments asserted that remailing services were provided for a lesser cost than U.S. airmail, thereby also enhancing the ability of American firms to compete abroad. Although the Postal Service did not receive across-the-board data on the level of service provided by remailers, many commenters did provide information, testimonial in nature, indicating that their use of remail services has resulted in time and cost savings. Numerous commenters noted that this time and cost differential was

critical in order for letter matter being sent abroad to retain its commercial value. Several commenters also stated that, without faster and cheaper services provided by remailers, it would not be feasible for their businesses to compete in the international markets. The Postal Service found it significant that the comments received in response to the October 10 notice, which proposed language to make clear that remailing is not authorized under the suspension for extremely urgent letters, were overwhelming in their support of remailing. The Department of Commerce informed us that international remailing is of benefit to American businesses in foreign markets, a position also reflected in comments from the Department of Justice and the Office of Management and Budget.

Content of the Suspension

The new suspension, which is codified as § 320.8 of title 39, Code of Federal Regulations, suspends, in § 320.8 operation of the Statutes:

to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside of the United States.

The proposal also makes explicit in proposed § 320.8(b) that the suspension does not authorize the remailing of letters for delivery within the United States:

This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

A third provision, in § 320.8(c), generally authorizes the Postal Service, after notice and hearing, to revoke the suspension for a period of one year, as to a particular shipper or carrier operating in violation of the suspension. This provision also provides that a shipper or carrier's failure to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service would, for the purpose of proceedings under this subsection, create a presumption of a violation. This has the effect of shifting the burden of demonstrating compliance to the shipper or carrier, who would have access to

relevant information which its failure to cooperate has denied to the Postal Service.

In view of the considerations discussed above, 39 CFR Part 320 is amended as follows:

(List of Subjects in 39 CFR Part 320)

Postal Service, Computer technology, Advertising.

PART 320—SUSPENSION OF THE PRIVATE EXPRESS STATUTES

1. The authority citation for Part 320 is revised to read as set forth below, and the authority citations following all the sections in Part 320 are removed.

Authority: 39 U.S.C. 401, 404, 601-606; 18 U.S.C. 1693-1699.

2. A new § 320.8 is added to read as follows:

§ 320.8 Suspension for international remailing.

(a) The operation of 39 U.S.C. 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

Example (1) The letters to overseas customers of commercial firm A in Chicago are carried by Carrier B to New York where they are delivered to Carrier C for carriage to Europe. Carrier C holds the letters in its distribution center overnight, then sorts them by country of destination and merges them with letters of other firms to those countries before starting the carriage to Europe in the morning. The carriage of firm A's letters is not interrupted. The suspension for international remailing applies to the carriage by Carrier B and by Carrier C.

Example (2) The bills addressed to foreign customers of the Chicago branch office of commercial firm D are carried by Carrier E to New York where they are delivered to the accounting department of firm D's home office. The accounting department uses the information in the bills to prepare its reports of accounts receivable. The bills are then returned to Carrier E which carries them directly to

Europe where they are entered into the mails of a foreign country. The carriage of the bills from Chicago to Europe is interrupted in New York by the delivery to firm D's home office. The suspension for international remailing does not apply to the carriage from Chicago to New York. It does apply to the subsequent carriage from New York to Europe.

(b) This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

Example (1) A number of promotional letters originated by firm F in Los Angeles are carried by Carrier G to Europe for deposit in the mails of a foreign country. Some of the letters are addressed to persons in Europe, some to persons in the United States. The suspension for international remailing does not apply to the letters addressed to persons in the United States.

(c) Violation by a shipper or carrier of the terms of this suspension is grounds for administrative revocation of the suspension as to such shipper or carrier for a period of one year in a proceeding instituted by the General Counsel in accordance with Part 959 of this chapter. The failure of a shipper or carrier to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service for the purpose of determining compliance with the terms of this suspension shall be deemed to create a presumption of a violation for the purpose of this paragraph (c) and shall shift to the shipper or carrier the burden of establishing the fact of compliance. Revocation of this suspension as to a shipper or carrier shall in no way limit other actions as to such shipper or carrier to enforce the Private Express Statutes by administrative proceedings for collection of postage (see § 310.5) or by civil or criminal proceedings.

Fred Eggleston,

Assistant General Counsel, Legislative Division.

(FR Doc. 86-18752 Filed 8-19-86; 8:45 am)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN POSTAL WORKERS UNION, AFL-CIO

1300 L Street, N.W.

Washington, D.C. 20005

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

100 Indiana Avenue, N.W.

Washington, D.C. 20001,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE

475 L'Enfant Plaza

Washington, D.C. 20260,

Defendant,

and

AIR COURIER CONFERENCE OF AMERICA

2011 Eye Street, N.W.

Washington, D.C. 20006,

Intervenor.

Civil Action No. 87-3199

Judge Charles R. Richey

ORDER

HAVING CONSIDERED the Air Courier Conference of America's (ACCA) motion to intervene, memorandum of points and authorities in support thereof, the responses of plaintiff and defendant thereto, and the entire record herein and it appearing to the Court that the motion should be granted, it is this 26 day of February, 1988;

ORDERED that ACCA's motion to intervene be and is hereby granted pursuant to Rule 24(b).

United States District Judge

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA
AMERICAN POSTAL WORKERS UNION, AFL-CIO,
and NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,
Defendant.

Civil Action No. 87-3199

APPEARANCES

Plaintiffs: For the American Postal Workers Union, AFL-CIO, Anton G. Hajjar, O'Donnell, Schwartz & Anderson, Washington, D.C. For the National Association of Letter Carriers, AFL-CIO, Richard N. Gilberg, Sophia E. Davis, Cohen, Weiss and Simon, New York, New York.

Defendant: Jay B. Stephens, United States Attorney, John D. Bates and Wilma A. Lewis, Assistant United States Attorneys; of counsel, Charles D. Hawley, Catherine V. Pagano, Law Department, United States Postal Service.

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

INTRODUCTION

The United States Postal Service (the "Service") enjoys a statutory monopoly over the delivery of mail in and from the United States. This monopoly, as the Supreme Court recently noted, "has prevailed in this country since the Articles of Confederation," and is intended to ensure "prompt, reliable, and efficient services to [postal] patrons in all areas." *Univ. of California v. Public Employment Rela-*

tions Bd., 108 S. Ct. 1404, 1408 (1988)(quoting 39 U.S.C. § 101(a)). The monopoly is embodied in the Private Express Statutes (the "PES"). 18 U.S.C. §§ 1693-1699; 39 U.S.C. §§ 601-606. The monopoly serves its purpose by ensuring that the revenues available to the Service are not endangered by private competition in less costly, and thus more profitable, segments of the mail delivery market.

Although Congress has granted the Service a complete monopoly in the PES, Congress has also granted the Service the power to suspend that monopoly in certain situations. Under 39 U.S.C. § 601(b), the Service "may suspend the operation of any part of [the PES] upon any mail route where the public interest requires the suspension." This lawsuit concerns the Service's decision to voluntarily suspend its monopoly under the PES with respect to that part of the mail-delivery market known as "international remailing." The regulation which suspended the Service's monopoly effectively defines "international remailing" by its description of what is permitted: the regulation "permits the uninterrupted carriage [by private entities] of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside of the United States." 39 C.F.R. § 320.8. The Service issued the regulation on August 20, 1986.

The plaintiffs, the American Postal Workers Union and the National Association of Letter Carriers (hereinafter the "Unions"), filed this suit on November 25, 1987.¹ They allege that the Service's decision to permit private international remailing violated the APA in two respects. First, they claim that the decision was arbitrary, capricious and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A). Second (and not so differently) they claim that the decision was in excess of the statutory authority granted the Service under 39 U.S.C. § 601(b), and therefore in violation of 5 U.S.C. § 706(2)(B). In a nutshell, the Unions contend that the Service applied the wrong legal standard in deciding to suspend international remailing monopoly.

¹ According to the Unions' complaint, the American Postal Workers Union represents approximately 250,000 Service employees "in the clerk, maintenance, special delivery messenger, and motor vehicle service crafts nationwide." Comp. at ¶ 4. The National Association of Letter Carriers represents approximately 220,000 Service employees "in the city letter carrier craft nationwide." Comp. at ¶ 5.

They further contend that the Service failed to develop an adequate record upon which to base its decision, and that it drew incorrect inferences from the record that did exist. The Service has met the Unions' contentions on the merits, and has argued in addition that the Unions lack standing to challenge its decision.

The matter came before the Court on the parties' cross-motions for summary judgment. On October 17, 1988, the Court granted judgment in favor of the Service. As further explained herein, the Court concluded that the Unions do not enjoy standing to challenge the Service's decision in this matter, and further, that the Service's decision did not violate the APA.

DISCUSSION

1. Standing

The Service contends that the Unions lack standing because they have not been able to show an actual or threatened injury to their membership, and because they are not within the "zone of interests" that the PES are designed to protect. This Court disagrees that the Unions have not shown a sufficient actual or threatened injury, but agrees with the Service that the Unions are not within the "zone of interest" that the PES are designed to protect.

An essential element of standing in an Article III court, whether suit has been brought to review agency action or otherwise, is that the plaintiff must be capable of showing actual or threatened injury. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Service contends that the Unions have made no such showing here, in that they have offered no proof that their respective memberships have lost jobs or been expressly threatened with the loss of jobs.

The Service is correct; the Unions have made no such showing. However, the Unions have not attempted to make such a showing. Instead, the Unions allege that the decision to permit private international remailing, with its attendant loss of revenue to the Service, inflicts harm upon its membership through the loss of "employment opportunities." Compl. at ¶ 16. The Unions reason that, even if no jobs are directly lost, the relinquishment of international remailing to the

private sector reduces the current membership's opportunity to engage in international remailing, and thereby reduces the membership's opportunity to obtain "work time, overtime, employment opportunities, future benefits and . . . morale." Pl. Mem. at 8 (*quoting National Association of Letter Carriers, AFL-CIO v. Independent Postal System of America*, 470 F.2d 265, 270 (10th Cir. 1972)).

The Court agrees with the Unions that the reasonable prospect of reduced employment opportunities, even if no specific loss currently can be shown, satisfies the "threatened injury" requirement of standing. There is authority from the Tenth Circuit for this finding in a context virtually identical to that presented here. *See American Postal Workers Union, AFL-CIO v. React Postal Services*, 771 F.2d 1375, 1380 (10th Cir. 1985) (whenever private entity permitted to perform postal functions contrary to the PES, the "employment opportunities of the postal workers are inevitably reduced"); *National Association of Letter Carriers, AFL-CIO, supra*, 470 F.2d at 270 (injury in fact due to "significant" loss of employment opportunity where PES not complied with). This conclusion is further consistent with authority in this Circuit arising in slightly different contexts. *See, e.g., Intern'l Union of Bricklayers v. Meese*, 761 F.2d 798, 802 (D.C. Cir. 1985) (union had standing because guidelines allowing aliens to enter workforce would interfere with jobs which "would otherwise likely go to union members"); *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984) (alleged loss of "employment opportunity," though no loss of present jobs shown, sufficient to confer standing); *National Treasury Employees Union v. Horner*, 659 F. Supp. 8, 12 (D.D.C. 1986) (union had standing where agency action would permit outside competition with membership).

However, the Court disagrees with the Union on the question of whether the interests asserted here fail within the "zone of interest" implicated by the PES. In *Clarke v. Securities Indus. Ass'n*, ___ U.S. ___, 107 S.Ct. 750 (1987), the Supreme Court expanded upon its prior holdings that, in addition to the constitutional requirement of injury in fact, a plaintiff seeking review of agency action under 5 U.S.C. § 702 must show that he or she falls within the "zone of interests" protected by the statute at issue. This additional requirement, termed a "gloss on the meaning of § 702," 107 S.Ct. at 758 n.16, serves as "a guide for deciding whether, in view of Congress' evident intent to make agency

action reviewable, a particular plaintiff should be heard to complain of a particular agency decision." 107 S.Ct. at 757. In situations such as this, where the plaintiff is not the object of the agency action, but instead complains of the indirect consequences of that action, the test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*

Here, the avowed interests of the Unions' respective memberships — the retention of employment opportunities — simply bear no reasonable relationship to the purposes of the PES. The PES monopoly was designed to ensure only that the Service maintains sufficient revenue to be able to provide efficient and effective mail delivery services to all aspects of the market. The Service retains the express authority to suspend that monopoly when the public interest requires such a suspension. There is simply no evidence that the PES was intended to provide, even indirectly, job security for Service employees, or that job security for Service employees furthers in any way the purposes of the PES. The interests asserted by the Unions simply bear no relation to the purposes and policies implicit in the PES — indeed, they might well diverge in certain situations² — and it is therefore reasonable to assume that Congress did not intend for Service employees to enjoy the right to review the Service's decisions with respect to the PES.

The Unions' position, in essence, fails to distinguish between the harm required to establish injury — essentially quantitative deter-

² The "interest" created by the PES is in maintaining sufficient revenue, by means of a monopoly, to permit the Service to serve the totality of the mail-delivery market in the United States. As Congress expressly recognized in 39 U.S.C. § 601(b), there may be situations in which the "interest" of the PES may be achieved *without* benefit of the monopoly. Yet, *anytime* private entities engage in mail delivery of virtually any type, the employment opportunities of Service employees will arguably be endangered. As a result, Service employees and their Unions will *always* have an incentive to challenge a suspension of the PES, without regard to the relationship between the suspension and the "public interest" as contemplated by § 601(b). Thus, even when the "interest" protected by the PES clearly and unequivocally favors a suspension, the Unions will nevertheless have an interest in challenging the suspension. In this respect, the "interests" of the Union and the "interest" created by the PES not only do not converge, but in certain circumstances clearly diverge.

mination — and the harm required to bring a plaintiff within the "zone of interest" test — essentially a qualitative determination. Alternatively, the distinction can be seen as one between a "zone of interest" and a "zone of consequence." Judge Wilkey's opinion in *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 144-45 (D.C. Cir. 1977), is helpful in this regard. There, Judge Wilkey excluded from the "zone of interest" of a provision of the Internal Revenue Code a person whose competitive position had been injured by the IRS's interpretation of the statute.³ Judge Wilkey wrote, in an analysis that is quite apposite here:

Every decision by a government agency generates consequences and various forms of impact on a wide range of valid interests held by a diverse range of parties. There is no doubt that the decisions embodied in the challenged revenue rulings have had an impact on [appellant]. But the concepts of *consequence* and *impact* are not the proper guideposts to define the relevant zone of interests; reference to these concepts does not aid greatly in determining whether a protected interest exists, but rather serve as part of the vocabulary in defining the relationship between an alleged injury and an asserted interest.

Thus, *consequences* and *forms of impact* do play an important role in the law of standing; these concepts are relevant in determining whether there has been *injury in fact*. . . . We cannot define the zone of interests as being the equivalent in every case of the "zone of impact" or the "zone of consequences." To do so would establish a standing doctrine based solely on the existence of harm to a party.

(emphasis in original). See also *Leaf Tobacco Exporters Ass'n. Inc. v. Block*, 749 F.2d 1106, 1116 (4th Cir. 1984)("[E]very executive action

³ Although the *Tax Analysts* decision did not involve review of an agency decision, as did *Clarke*, it applied the "zone of interest" test first developed in *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150 (1970). In *Clarke*, however, the Supreme Court expressly reiterated and reaffirmed the strength of the test as first announced in *Data Processing*.

portends endless adverse impacts and infinite adverse ramifications. We decline to convert the zone of interests test to one that calibrates zones of impact or zones of consequence."'). Here, as in the above-cited decisions, while the Service's decision may have an *impact* upon the employment opportunities of the Unions' members, that impact is simply not of a type that falls within the zone of interests implicated by the PES, even taking into consideration the liberal teachings of *Clarke*.⁴ The Union's members therefore do not have standing under 5 U.S.C. § 702 to challenge the Service's decision to suspend the Service's monopoly over private remailing.

2. Violations of the Administrative Procedures Act

Even if the Unions had standing to challenge the Service's decision, however, it is apparent from the record that their challenge would fail under the APA.

The Unions' first contention, that the Service exceeded its statutory authority in suspending the monopoly, rests upon the claim that the language of 39 U.S.C. § 601(b) requires that the Service find something close to a compelling public need before it may suspend the monopoly in any segment of the mail delivery market. The Unions assert that the Service's decision therefore violated 5 U.S.C. § 706 (2)(B), because the record upon which the Service based its decision did not reflect such a compelling public need.

Although it appears that no court has interpreted § 601(b) in this context, the Court is comfortable that the Service bears no such heightened burden in justifying its actions. The "public interest . . .

⁴ Although the specifics of this situation clearly support the conclusion reached, the logic of the result is strengthened when one considers that a contrary holding would implicitly grant standing under § 702 to *any* agency employee whose job or employment opportunities were threatened as a result of an agency decision. At bottom, the Unions here seek standing because the Service's decision will likely result in reduced revenue for the service, and, as a result, reduced employment opportunities for Service employees. Yet, agencies make decisions *every day* that affect the allocation of resources within and among agencies, and thus affect the job prospects of agency employees. It is unreasonable, at least in the consideration of this court, to assume that Congress intended to make § 702 available to any disgruntled agency employee.

requires" language that is at issue here also authorizes myriad forms of agency action throughout the United States Code. Yet, to this Court's knowledge, it has never been construed to impose upon an agency the heightened standard that the Unions request here. Indeed, the opposite would appear to be true; the "public interest . . . requires" language appears to suggest substantial discretion in an agency to define the public interest in a given situation and to act accordingly. Rather than indicating Congress' desire to cabin the Service's discretion, the language of § 601(b) implies to this Court, based upon the operation of similar language elsewhere, a desire to vest the Service with substantial discretion. *See, e.g., F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 593-94 (1981) ("public interest" language deemed to grant agency broad discretion).

Here, the Service made an express finding that the public interest, as expressed in the responses to its notice of proposed rulemaking, favored the entry of private firms into the international remailing market. Although the Unions are entitled to quarrel, and do quarrel, with the Service's conclusion that the record supports its decision, it appears that the Service applied the proper standard here, and therefore did not act in excess of its statutory authority under § 601(b).

The Unions' second contention under the APA is that the Service's decision was "arbitrary, capricious and an abuse of discretion," and therefore in violation of 5 U.S.C. § 706(2)(A). The Unions contend, in essence, that the Service's decision was not based upon adequate evidence that the public interest supports private international remail, and that the Service did not consider the proper factors regarding the revenue effects of its decision.

This Court disagrees. Under the Supreme Court's articulation of the arbitrary and capricious analysis in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), an agency need only "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"

Here, the administrative record indicates that the Service initially promulgated a rule designed to perpetuate the Service's monopoly over international remailing. This initial position met with strong, nearly unanimous public opposition to a continuation of the monopoly over this segment of the market, including opposition from various

government officials.⁵ In response to this strenuous opposition, the Service sought the public's reaction to a suspension of the monopoly and a transfer of international remailing to the private sector. The public reaction the second time around was somewhat limited; only twenty-five responses were received, but again, nearly all favored private international remailing. Based upon these responses, and conceding that the public input lacked to some extent the factual specificity the Service had hoped for,⁶ the Service's issuing release stated as follows:

The comments were almost universally consistent in their observations regarding the level of service provided by [private] remailers. Specifically, the comments asserted that remailing was faster than U.S.

⁵ The Service's proposal to *retain* the monopoly over international remailing, first published October 10, 1985, was opposed by, among others, James Miller, Director of the Office of Management and Budget, Beryl Sprinkel, Chairman of the Counsel of Economic Advisors, Malcolm Baldrige, Secretary of Commerce, Congressmen Mickey Leland, Frank Horton and Robert Garcia, members of the Subcommittee on Postal Operations and Services, and the Attorney General.

⁶ In its issuing release, the Service specifically noted the objection that the Unions had raised at the notice and comment stage, and that they reiterate here — that the record lacks sufficient empirical data to justify the Service's conclusion that the public interest supports a suspension. In the release, however, the Service responded that "[i]t may well be . . . that, because of the diverse character of the remail industry and the relatively recent development of remailing, the comprehensive information we had hoped to receive to supplement the essentially anecdotal information, which was furnished to us, is not available. Nonetheless, the Postal Service has compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension." 51 Fed. Reg. at 29637. The Court regards the Service's response as adequate under the circumstances, and does not view the relative dearth of empirical data as undermining the Service's evaluation of the "public interest." See, e.g., *F.C.C. v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-14 (1978) (factual specificity not always required where "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency") (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961); *Nat'l Ass'n of Regulatory Utility Commissioners v. F.C.C.*, 737 F.2d 1095, 1140-41 (D.C. Cir. 1984) (absence of complete factual support not fatal to agency decision under arbitrary and capricious review; even though "an agency's decision is a difficult one, or that the decision rests on a set of evidentiary facts less desirable or complete than one which would exist in some regulatory utopia does not alter our role").

airmail and that this time savings is often critical to the ability of American businesses to compete in foreign markets. Moreover, the comments asserted that remailing services were provided for a lesser cost than U.S. airmail, thereby also enhancing the ability of American firms to compete abroad. Although the Postal Service did not receive across-the-board data on the level of service provided by remailers many commenters did provide information, testimonial in nature; indicating that their use of remail services has resulted in time and cost savings. Numerous commenters noted that this time and cost differential was critical in order for letter matter being sent abroad to retain its commercial value. Several commenters also stated that without faster and cheaper services provided by remailers, it would not be feasible for their business to compete in the international markets. The Postal Service found it significant that the comments received in response to the October 10 notice, which proposed language to make clear that [the monopoly applies to international remailing], were overwhelming in their support of remailing. The Department of Commerce informed us that international remailing is of benefit to American businesses in foreign markets, a position also reflected in comments from the Department of Justice and the Office of Management and Budget.

51 Fed. Reg. at 29637. The Service's explanation of its decision and the bases therefore, while perhaps lacking the factual specificity that might exist in a "regulatory utopia," can hardly be regarded as arbitrary, capricious and an abuse of discretion. Section 601(b) expressly entrusted the Service with the task of deciding whether the public interest supports a continued monopoly over international remailing, and this Court simply cannot conclude, on the record before it, that the Service carried out its task in a manner that would justify judicial intervention. The Service has identified the factors supporting its decision, drawn rational inferences where detailed facts did not exist, and drawn a rational connection between the facts found and the decision made. The APA requires no more.

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Because the Service's decision was not in excess of statutory authority, and was not arbitrary, capricious and an abuse of discretion, the Service would be entitled to judgment as a matter of law even if the Unions had standing to bring this action.

Date: December 20, 1988

Charles R. Richey
United States District Judge